

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP461

**Cir. Ct. Nos. 2013CV634
2014CV652**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**JENNIFER J. LAACK, INDIVIDUALLY AND AS SPECIAL
ADMINISTRATOR OF THE ESTATE OF COURTNEY S. LAACK, DECEASED,**

PLAINTIFF-CO-APPELLANT,

V.

**THE CINCINNATI INSURANCE COMPANY, DODGE CONCRETE, INC. AND
MICHAEL J. WEISS,**

DEFENDANTS-APPELLANTS,

**ABC INSURANCE COMPANY, JEFFREY E. LOREY, ARTISAN AND
TRUCKERS CASUALTY COMPANY AND KENNETH M. LAACK,**

DEFENDANTS,

MASSACHUSETTS BAY INSURANCE COMPANY,

INTERVENOR-RESPONDENT.

MASSACHUSETTS BAY INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

**JEFFREY LOREY, WISCONSIN DEPARTMENT OF TRANSPORTATION,
ARTISAN AND TRUCKERS CASUALTY COMPANY, A WISCONSIN
CORPORATION AND KENNETH M. LAACK,**

DEFENDANTS,

**DODGE CONCRETE INC., A WISCONSIN CORPORATION, MICHAEL J. WEISS
AND THE CINCINNATI INSURANCE COMPANY, A WISCONSIN CORPORATION,**

DEFENDANTS-APPELLANTS,

**JENNIFER J. LAACK, INDIVIDUALLY, AND AS SPECIAL
ADMINISTRATOR OF THE ESTATE OF COURTNEY S. LAACK, DECEASED,**

DEFENDANT-CO-APPELLANT.

APPEAL from an order of the circuit court for Washington County:
JAMES K. MUEHLBAUER, Judge. *Reversed and cause remanded.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Jennifer J. Laack, The Cincinnati Insurance Company, Dodge Concrete, Inc., and Michael J. Weiss (collectively, the appellants) appeal from a circuit court order granting summary and declaratory judgment in favor of Massachusetts Bay Insurance Company on the issue of insurance coverage. Because we conclude that summary and declaratory

judgment were not appropriate on this record, we reverse and remand for further proceedings.

¶2 This case arises out of a September 14, 2012 car accident that caused the death of Courtney Laack. Courtney was a passenger in a Volkswagen Jetta driven by Jeffrey Lorey. The Jetta collided with a truck driven by Michael Weiss, who was employed by Dodge Concrete.

¶3 Massachusetts Bay issued a homeowners policy to Jeffrey’s father and stepmother, George and Tracey Lorey of Oconomowoc. The policy included a personal umbrella liability supplement, which provided liability coverage to any person permissively using an automobile owned by either one of them. The supplement states in relevant part:

“We” will pay on behalf of the “insured” all losses for which the “insured” is legally liable in excess of the “Required Primary Underlying Insurance Policy” ... because of “bodily injury”, “personal injury” or “property damage” to which this insurance applies caused by an “occurrence” as defined and covered by the terms of this supplement.

¶4 The supplement defines “insured” to include:

2. With respect to liability covered by this policy arising out of the ownership, maintenance or use of an “auto”

a. any person while using with “your” permission, any “auto” ... “you” own....¹

¶5 Jeffrey and George bought the Jetta in April 2011, with Jeffrey paying most of the purchase price. They decided to title the car in George’s name.

¹ The supplement defines “you” as the named insureds, George and Tracey. It does not define “own.”

¶6 Jeffrey was the Jetta's primary driver and used the car as if it were his own. He was responsible for maintaining and fueling it. Furthermore, he had possession of the car and kept it in Madison where he lived. Jeffrey never had to ask George for permission to use the car.

¶7 In the spring of 2012, Tracey learned that Jeffrey's driver's license was suspended. She informed George, who, in turn, told Jeffrey not to drive without a license, noting that he could go to jail. George had several conversations about the matter with Jeffrey because he knew that his son "tended not to follow the rules." George later characterized these conversations as "fatherly advice" and "advice that I would give to anybody."

¶8 Jeffrey continued to drive the Jetta after his conversations with George. He later testified that the conversations centered more on him getting his license back than on prohibiting the use of the Jetta. He described George's discussions about not driving as a "suggestive kind of thing."

¶9 After the fatal car accident, Massachusetts Bay filed an action seeking a declaration that no insurance coverage existed under its policy issued to George and Tracey. Its action was subsequently consolidated with the wrongful death action of Courtney's estate.

¶10 Upon consolidation, Massachusetts Bay moved for summary and declaratory judgment on the issue of coverage. Following briefing on the matter, the circuit court granted the motion. The court concluded that Jeffrey did not qualify as an "insured" under the umbrella liability supplement because he, not George, was the owner of the Jetta. The court also concluded that the Jetta was not covered under the supplement because there was no primary insurance on it. This appeal follows.

¶11 In this case, we are asked to determine whether the circuit court properly granted Massachusetts Bay’s motion for summary and declaratory judgment. Whether summary judgment is properly granted presents a question of law, which we review independently. *Olson v. Farrar*, 2012 WI 3, ¶¶22-23, 338 Wis. 2d 215, 809 N.W.2d 1. Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2013-14).² In deciding if genuine issues of material fact exist, we draw all reasonable inferences in favor of the nonmoving party. *Metropolitan Ventures, LLC v. GEA Assocs.*, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58.

¶12 The grant or denial of a declaratory judgment, meanwhile, is addressed to the circuit court’s sound discretion. *Olson*, 338 Wis. 2d 215, ¶24. However, when the exercise of that discretion “turns upon a question of law, we review the question independently.” *Id.* Here, the circuit court’s grant of declaratory judgment turned upon the “interpretation of an insurance policy, which presents a question of law.” *Id.*

¶13 On appeal, the appellants contend that the circuit court erred in granting Massachusetts Bay’s motion for summary and declaratory judgment. Specifically, they assert that Jeffrey qualified as an “insured” under the umbrella liability supplement because (1) George was the owner of the Jetta and (2) Jeffrey had George’s permission to use it. They further assert that the failure to maintain primary insurance on the Jetta does not invalidate the supplement’s coverage of it.

² All references to the Wisconsin Statutes are to the 2013-14 version.

¶14 Based on this record, we agree with the appellants that George was the owner of the Jetta. The car was titled in his name, and this court has previously recognized that, “[i]n common usage, ‘owner’ is often equated to title-ownership.” *Duncan v. Ehrhard*, 158 Wis. 2d 252, 260, 461 N.W.2d 822 (Ct. App. 1990) (citing *Kietlinski v. Interstate Transp. Lines*, 3 Wis. 2d 451, 458, 88 N.W.2d 739 (1958)). The fact that Jeffrey used the car as his own does not change this analysis, as there is no evidence of any intent to transfer title to him.³

¶15 We also conclude that there is at least a genuine issue of material fact as to whether Jeffrey had George’s permission to use the Jetta at the time of the accident. Although there is evidence that George told Jeffrey not to drive without a license, there is also evidence from which a jury could reasonably conclude that this was more along the lines of fatherly advice and suggestion, rather than an outright prohibition. Indeed, George took no other steps (e.g., taking the keys away or taking possession of the car) to prevent Jeffrey from driving the Jetta. Drawing all reasonable inferences in favor the appellants, we cannot say that Massachusetts Bay is entitled to summary judgment on this issue.

¶16 Finally, we agree with the appellants that the failure to maintain primary insurance on the Jetta does not invalidate the umbrella liability supplement’s coverage of it. Although the supplement did require that the insured purchase and maintain primary insurance, it specifically stated that failure to do so would not invalidate its coverage:

³ In proceedings before the circuit court, Massachusetts Bay did not dispute that George was the owner of the Jetta. Indeed, it cited the car’s certificate of title and declared that it was “conclusive proof” that George owned it. We agree.

It is a condition of this policy that “you” and any covered family members must maintain in full effect primary underlying liability insurance of the types and in at least the amounts set forth below, covering “your” personal liability and, to the extent “you” have such liability exposures, all vehicles ...”you” or “your” family members own, or rent....

....

Failure by “you” or any covered family members to comply with this condition shall not invalidate this part of “your” policy.... In the event of any such failure, “we” shall only be liable in excess of the minimum amounts expressed here. With respect to coverages, amounts and defense costs, our liability will be no greater than had this failure not occurred. (Emphasis added.)

¶17 For these reasons, we conclude that summary and declaratory judgment were not appropriate in this case. Accordingly, we reverse and remand for further proceedings.⁴

By the Court.—Order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

⁴ Because we reverse the order of the circuit court, we do not address the appellants’ alternative argument to defeat summary and declaratory judgment, i.e., that a different section of Massachusetts Bay’s policy provided uninsured motorist coverage for Courtney.

